

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE  
JUDICIAL CONDUCT AND  
DISABILITY ACT

No. 10-12-90018

Before **BRISCOE**, Chief Judge.

**ORDER**

Complainant has filed a complaint of judicial misconduct against a district judge in this circuit. My consideration of this complaint is governed by 1) the misconduct rules issued by the Judicial Conference of the United States, entitled *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (the “Misconduct Rules”); 2) the federal statute dealing with judicial misconduct, 28 U.S.C. § 351 *et seq.*, and 3) the “Breyer Report,” a study by the Judicial Conduct and Disability Act Study Committee, headed by Supreme Court Justice Stephen Breyer, entitled *Implementation of the Judicial Conduct and Disability Act of 1980*. The Breyer Report may be found at: <http://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf>. To the extent that there are any relevant prior decisions of the full Judicial Council of this circuit which are consistent with those authorities, they may also govern my consideration of this complaint.

Complainant has been provided with a copy of the Misconduct Rules, and the Rules are also accessible on the Tenth Circuit’s web page at:

<http://www.ca10.uscourts.gov/misconduct.php>. In accord with those rules, the names of the complainant and subject judge shall not be disclosed in this order. *See* Misconduct Rule 11(g)(2).

The subject judge held a hearing on a motion for injunctive relief in an underlying case in which claimant was one of several defendants. Claimant takes issue with conduct by the subject judge during an *in camera* session following the hearing, and a subsequent brief continuation of the hearing itself. I have conducted a limited inquiry on these claims by reading the official transcript of the hearing, pursuant to Misconduct Rule 11(b), in addition to the transcript provided by claimant as Exhibit A to the misconduct complaint.

The *in camera* session was held to consider defense counsel's motion to withdraw. Claimant alleges that the judge tried to coerce claimant into consenting to the motion. However, a review of the relevant transcript belies this claim. It indicates that the judge asked claimant whether there were any objections to the motion, and explained how the local rules applied to both individual and corporate defendants. The judge made no effort to convince claimant to consent.

Claimant also alleges that, once the judge indicated the motion to withdraw would be granted, claimant and the other defendants were essentially unrepresented at the hearing, making the brief continuation of that proceeding an *ex parte* communication. Claimant contends that the judge's ruling was an abuse

of discretion and violated a local court rule. Claimant asserts that the judge shared privileged information with plaintiff's counsel once the hearing had reconvened, and challenged the judge's statements allowing plaintiff's counsel to contact individual defendants directly. Although claimant attempts to couch these claims as misconduct, I conclude that these allegations are all "directly related to the merits of a decision or procedural ruling." Misconduct Rule 11(c)(1)(B). As explained in the Breyer Report, this exclusion of matters related to the merits of underlying cases protects the independence of the judges deciding those cases. *See* Breyer Report, App. E., ¶ 2.

Claimant also argues that the court wrongly kept the Exhibit A transcript under seal until recently, depriving trial and appellate counsel of crucial information. Claimant contends, without factual support, that the subject judge "secreted" the hearing transcript. The Misconduct Rules require complainants to support their allegations with "sufficient evidence to raise an inference that misconduct has occurred." *See* Misconduct Rule 11(c)(1)(D). These allegations do not support a reasonable inference of misconduct on the part of the subject judge. Otherwise, this argument generally implicates the judge's handling of the underlying case on the merits.

Finally, the misconduct complaint also contain allegations against both defense and plaintiff's counsel. These misconduct procedures apply only to federal judges, *see* Misconduct Rule 4.

Accordingly, this complaint is dismissed pursuant to Misconduct Rule 11(c). The Circuit Executive is directed to transmit this order to complainant and copies to the subject judge and the Judicial Conference Committee on Judicial Conduct and Disability. *See* Misconduct Rule 11(g)(2). To seek review of this order, complainant must file a petition for review by the Judicial Council. The requirements for filing a petition for review are set out in Misconduct Rule 18(b). The petition must be filed with the Office of the Circuit Executive within 35 days of the date of the letter transmitting this order. *Id.*

So ordered this 25th day of June, 2012.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe  
Chief Circuit Judge